

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
Rules and Regulations Implementing the) CG Docket No. 02-278
Telephone Consumer Protection Act of 1991) CG Docket No. 18-152

**COMMENTS OF THE NATIONAL COUNCIL OF HIGHER EDUCATION RESOURCES TO THE REQUEST FOR
COMMENTS ON INTERPRETATION OF THE TELEPHONE CONSUMER PROTECTION ACT IN LIGHT OF THE D.C.
CIRCUIT’S ACA INTERNATIONAL DECISION**

I. Introduction

The National Council of Higher Education Resources (“NCHER”) is responding to the public notice request released on May 14, 2018 (the “Public Notice”) asking for comments on interpretation of the Telephone Consumer Protection Act (“TCPA”) in light of the D.C. Circuit’s ACA International decision. NCHER is a national, nonprofit trade association representing state, nonprofit, and private higher education agencies that make grant and loan assistance available to students and parents to pay for the costs of postsecondary education. Our membership includes organizations under contract with the U.S. Department of Education (the “Department”) to service and recover outstanding loans made under the William D. Ford Federal Direct Loan Program and organizations that service and recover outstanding loans made under the Federal Family Education Loan Program (“FFELP”) and private education loans.

A series of interpretive rulings by the Federal Communications Commission (the “Commission” or “FCC”) and the courts have created unnecessary communication barriers for federal and private loan service providers as they attempt to help student and parent borrowers repay their postsecondary education obligations. Our comments will first provide background on the federal student loan program and then address the specific comment requests included in the Public Notice.

II. Background - The Importance of Communication in the Student Loan Programs

A. The Federal Student Loan Programs Are Large and Growing, As Are Delinquencies and Defaults

The federal student loan programs have grown exponentially over the past decade and include more than \$1.375 trillion in outstanding loans made to 42.8 million borrowers.¹ Approximately \$191 billion of these federal loans are in “default,”² according to the Department³. Further, the Department reports that one in six Direct

¹ See Department of Education, Federal Student Aid Data Center, Federal Student Aid Portfolio Summary, <https://studentaid.ed.gov/sa/about/data-center/student/portfolio> (last visited June 6, 2018).

² A student loan becomes “past due” or “delinquent” when a payment is missed. A loan becomes in “default” when it has been delinquent for 271 days. See 34 C.F.R. § 682.411 (outlining due diligence “collection efforts” lenders must engage in while a FFELP loan is delinquent).

³ See Department of Education, Federal Student Aid Data Center, Direct Loan and Federal Family Education Loan Portfolio by Loan Status, <https://studentaid.ed.gov/sa/about/data-center/student/portfolio> (last visited June 6, 2018).

Loan Program borrowers in repayment are more than 30 days past due.⁴ Nearly 10 percent of borrowers in repayment are seriously delinquent and have gone more than 90 days without making a payment.⁵ These challenges with student loan debt – as well as larger issues around college affordability - have risen over the last several years. On an almost daily basis, major media outlets discuss the burden that former student and parent borrowers encounter in repaying their student loans and how it is affecting life decisions such as starting a family, buying a home, or saving for retirement.

B. Servicers and Collectors Have Tools to Help Borrowers

The federal student loan programs, including loan repayment options, have become increasingly complex over the last decade. The programs are unique among consumer credit programs because they allow students and parents to borrow large sums of money without showing credit-worthiness or an ability to pay. The programs also include many unique features designed to address personal circumstances and to help distressed borrowers faced with loan collection. For example, payments on federal student loans can be deferred for borrowers who return to school, are unemployed, or are otherwise experiencing a financial hardship. Once in repayment, borrowers have nine different options available to them under the Higher Education Act of 1965. These include fixed payments based on a 10 to 30 year repayment period, graduated payments that increase over time, and six different plans that base payments on a borrower's current income. For those choosing and qualifying for an income-driven repayment ("IDR") plan, the borrowers may have no monthly payments and can have their remaining balances forgiven after a certain period of time. Eligibility requirements differ for each of the respective plans, and federal law requires borrowers to update their financial and demographic data on an annual basis to stay enrolled in an IDR plan. Unfortunately, some borrowers fall into delinquency and default without accessing these increasingly complex options. As reinforced by the Department, "when borrowers fall into delinquency, federal student loan servicers must be able to proactively reach out to them to make them aware of their options and to help them access the repayment plan that best suits their needs."⁶

Multiple deferment and forbearance options are also available to distressed borrowers. Some federal student loans can also be discharged due to special circumstances such as disability, identity theft, and false certification of a loan application. Finally, if a borrower defaults on a federal student loan, the federal loan rehabilitation program allows him or her to "rehabilitate" that loan by making nine "reasonable and affordable" monthly payments over a 10-month period.⁷ Payments can be as low as \$5 per month. Successful rehabilitation removes a loan from default status and erases that status from the borrower's credit report. Individuals who rehabilitate their loans also regain all of their rights under the federal financial assistance programs, including eligibility for new loans and grants if they go back to school.

C. Live Communication With the Borrower is Needed

Many of the student and parent borrowers who are eligible for federal repayment assistance are unaware of the options available to them under the law and successfully access these programs only if they can be reached by their loan servicer or collector. This is why live two-way phone conversations are extremely important. However, individuals within the age groups of typical student loan borrowers are quickly abandoning traditional telephone

⁴ See Department of Education, Federal Student Aid Data Center, Direct Loan Portfolio by Delinquency Status, <https://studentaid.ed.gov/sa/about/data-center/student/portfolio> (last visited Jan. 20, 2016).

⁵ Id.

⁶ July 20, 2016 Memorandum on Policy Direction on Federal Student Loan Servicing from Ted Mitchell, Under Secretary of Education, p. 14.

⁷ 34 C.F.R. § 682.405(b)(1)(iii).

landlines and moving exclusively to cellular telephones. This is a critical point, since prior limitations on using current technology to efficiently reach borrowers on their cell phones unnecessarily stifles live communication. According to a recent study from the Centers of Disease Control and Prevention, over one-half of American homes (52.5 percent) had only wireless telephones during the first half of 2017, an increase of 3.2 percentage points since the first half of 2016. The percentage is even higher for those age brackets more likely to have student loans – nearly three-fourths of adults aged 25–29 (73.3 percent) and aged 30-34 (74.4 percent) live in households with only wireless telephones.⁸

In order to better understand the best method of communication for assisting struggling borrowers, NCHER commissioned an online Google Consumer Survey of current and former college students with student loans. The results, released in February 2016,⁹ revealed that 78.9 percent of respondents, aged 18-24, reported only owning a cellphone, compared to 3.1 percent of respondents, aged 18-24, who only own a landline. As a whole, 83.2 percent of all respondents reported owning a cellphone, compared to 27.3 percent who own a landline. A solid majority of respondents (70.7 percent) selected e-mail, text messages, or cell phone calls as the most effective and primary method of getting information to them. E-mail, most of which are accessed on a mobile device, ranked as the top method for all borrowers, but younger audiences gravitated much more toward text messages (which previously have been subject to the same restrictions as a cell phone call). For respondents of all age groups, traditional mail and landline calls ranked among the least-selected methods of effective contact. But this is the current method employed by federal servicers and collectors because of the restrictions imposed by the TCPA.

The value of live contact with student and parent borrowers is also demonstrated by a recent survey conducted for NCHER using data from four guaranty agencies that participate in the FFELP. Using randomly-selected past call data, the four agencies from four distinct regional markets within the U.S. compared the outcomes of delinquent borrowers who either had or had not participated in at least one live telephone conversation with the guaranty agency or its servicer. The results, summarized below, show significantly better outcomes for borrowers who had at least one live telephone conversation with their service provider.

| NCHER Phone Contact Survey | | Percent Cured | Average Number of Call Attempts |
|----------------------------|---------------|---------------|---------------------------------|
| Preliminary Summary | | | |
| GA #1 | Not contacted | 53.70% | 14 |
| | Contacted | 66.80% | 15 |
| GA #2 | Not contacted | 60.30% | 25 |
| | Contacted | 82.90% | 27 |
| GA #3 | Not contacted | 52.06% | 61 |
| | Contacted | 79.78% | 61 |
| GA #4 | Not contacted | 73.61% | 333 |
| | Contacted | 88.44% | 368 |

⁸ Blumberg SJ, Luke JV. Wireless substitution: Early release of estimates from the National Health Interview Survey, January–June 2017. National Center for Health Statistics. December 2017. Available from: <https://www.cdc.gov/nchs/nhis.htm>.

⁹ NCHER Poll: Improving Communication with Student Loan Borrowers, <https://www.ncher.us/news/news.asp?id=276898>.

One of the large federal student loan servicers, Navient, has stated that it is able to help resolve delinquencies and prevent default more than 90 percent of the time that it has a live conversation with a borrower. Conversely, 90 percent of the borrowers who default on their federal student loans never had a live conversation with Navient, despite its efforts to reach them. The company also reported that it was able to increase successful IDR plan enrollment by 50 percent through outreach to previously delinquent borrowers' cell phones.¹⁰

D. Multiple Attempts Are Needed to Reach a Borrower and Multiple Conversations Are Needed to Reach a Beneficial Resolution

As noted from the NCHER study on borrower contact, it frequently takes a number of call attempts to reach and have a live conversation with a borrower. Setting an unreasonably low number of allowable call attempts makes it extremely difficult to have a live conversation with a borrower. All parties involved in student loan servicing and collection have repeatedly pointed this out in past comments to the FCC. Significantly, the Department, in a letter to the Commission regarding a rulemaking applicable to servicing and collection of federally-owned and -guaranteed debt, stated that "to limit the number of covered calls to three per month per delinquency and only after delinquency has occurred, as provided in the FCC's proposed rule, would not afford borrowers sufficient opportunity to be presented with options to establish more reasonable repayment amounts and avoid default, especially given that the proposal limits the number of initiated calls, even if the calls go unanswered."¹¹ Navient also reported in past comments to the FCC that it has data showing that 25 percent of its federal student loan borrowers require 40 or more call attempts to reach them in a live conversation. Furthermore, Nelnet, another federal student loan servicer, has data demonstrating that 10 dials per month or approximately 2.3 calls per week should be an appropriate dial rate with borrowers, and that calling up to 10 times per month leads to 42 percent more live contacts compared to calling three times per month.¹²

E. Private Education Loan Borrowers Would Also Benefit From Better Communications

Many private education loan programs have similar repayment assistance programs for their borrowers, and would likewise benefit from multiple call attempts to help them repay their financial obligations. For example, state and nonprofit lenders offer their residents repayment options tied to their income, similar to the structure in the federal program. Also, Congress recently passed, and the President signed into law, the Economic Growth, Regulatory Relief, and Consumer Protection Act (Public Law 115-174), which allows private student loan borrowers who are in default to rehabilitate their loans and have the default record stricken from their credit report, similar to the federal rehabilitation program. Private loan borrowers should receive the same assistance from their service providers available to federal borrowers.

III. NCHER's Responses to Specific Requests for Comment

The TCPA prohibits the making of any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system ("ATDS") or an artificial or prerecorded voice. The TCPA defines an ATDS to be equipment which has the capacity— (A) to store or

¹⁰ Comments of Navient Corp., CG Docket No. 02-278, at 9-10 (filed June 6, 2016). See also the June 12, 2016 letter from Jack Remondi, President and Chief Executive Officer of Navient Corp., to the Consumer Financial Protection Bureau, filed in response to the Bureau's Request for Comments Regarding Student Loan Borrower Communications, CFPB Docket No. CFPB-2016-0018, p.1.

¹¹ Letter from Ted Mitchell, Undersecretary of Education to the Commission, posted July 11, 2016.

¹² Comments of Nelnet, Inc., CG Docket No. 02-278 at 14 (filed June 6, 2016) ("Nelnet Comments").

produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.¹³ The FCC requests comments on several issues related to the interpretation and implementation of this legislative provision.

A. What Is an Autodialer?

The Commission seeks comment on what constitutes an ATDS. The FCC’s 2015 Declaratory Ruling and Order¹⁴ (the “2015 Order”) took an expansive view of what constitutes capacity, holding that a device has the capacity to perform the functions required to be an ATDS so long as it could perform such functions by modifying the device or its software. The U.S. Court of Appeals for the District of Columbia Circuit overturned this part of the 2015 Order holding it arbitrary and capricious. In the wake of this long-awaited decision, NCHER welcomes the FCC’s action to invite public comment on how the Commission should interpret “capacity,” and fully support the recommendations on this issue set forth in the Petition for Declaratory Ruling filed by the U.S. Chamber of Commerce *et al.*¹⁵ The expansive interpretation of what constitutes an ATDS that were contained in the 2015 Order and some court decisions should be replaced by an interpretation of ATDS that sticks to the statutory language in the TCPA: to qualify as an ATDS, equipment must be able to store or produce numbers to be called using a random or sequential number generator, and be able to dial those numbers without human intervention. As a point of clarification, the Commission should make clear that the ATDS functions must actually be present in a device at the time a call is made and not merely be a potential capability. In this regard, we note that the TCPA makes no mention of potential capabilities, but rather states that, under the TCPA, an ATDS is limited to equipment that “has the capacity” to perform the ATDS functions. Finally, we support the position taken by the U.S. Chamber in its petition that to be implicated in the TCPA prohibition a call must be made using the ATDS capability.¹⁶ If a call is made using non-ATDS functionality, it should not be covered by the TCPA restriction. A call, in this case, would be no different than a call made by equipment that did not have ATDS capability. This definition comports with both the legislative language and the legislative intent, and we strongly recommend its adoption.

B. Calls to Reassigned Numbers

The Commission seeks comment on how to treat calls to reassigned wireless numbers where the prior subscriber provided consent to be called. In a reasonable world, the subscriber of a reassigned number would, when called, inform the caller that the number has been reassigned and that they are not the party the caller intended to reach. Once so notified, the caller would be liable for subsequent calls. This expectation presumably was a rationale for the “one-call safe harbor” in the 2015 Order. Unfortunately, many consumers do not readily answer and listen to calls, or respond to texts, which is why multiple attempts are necessary in order to reach an individual. NCHER recommends that callers be able to follow a “reasonable-reliance approach” under which, in reliance to the prior consent, they can call numbers until a live contact is made. If the FCC finds this approach unacceptable, we recommend that the Commission adopt a rule with a safe harbor that would allow a reasonable number of call attempts to reassigned numbers. The number should be based on a survey that would identify an empirically-based number of call attempts needed to make a live contact. In addition, NCHER strongly supports action by the Commission to establish a mechanism for voice service providers to report reassignments and for callers to access that information. We believe that there should be a safe harbor from liability for callers that use this mechanism (or check an existing third-party database) so long as they check the

¹³ 47 U.S.C. § 227 (b)(1)(A).

¹⁴ 30 FCC Rcd 7961 (2015).

¹⁵ U.S. Chamber Institute for Legal Reform *et al.*, Petition for Declaratory Ruling, CG Docket No. 02-278 (filed May 3, 2018).

¹⁶ *Id.* pp. 25-27.

database with sufficient frequency to catch numbers during the interval between a number's disconnection and reassignment. Finally, the cost to access this database should be reasonable. The availability of a comprehensive database should largely eliminate calls to reassigned numbers.

C. Revocation of Consent to Be Called

The Commission seeks comment on how a called party may revoke prior express consent to receive calls covered by the TCPA prohibition. The 2015 Order states that “a called party may revoke consent at any time and through any reasonable means” – orally or in writing – “that clearly expresses a desire not to receive further messages.” The U.S. Court of Appeals upheld the FCC’s interpretation of the TCPA in this regard. Nonetheless, NCHER believes that the FCC should provide clarifying guidance on how a calling party would meet the test of establishing “reasonable” means to revoke consent. The Commission should do so by specifying that a calling party’s procedures are reasonable if it establishes more than one way for a called party to revoke consent, and providing specific examples of means that the Commission deems to be reasonable. Examples would be the establishment of a dedicated toll free line to call and leave a message about revocation; the establishment of a dedicated email address to leave a message about revocation; or allowing a called party to click on a link on the calling party’s website about revocation. In all cases, a called party would have to provide sufficient information for the calling party to identify who is revoking consent and the accounts involved. We also recommend that the Commission provide examples of means that are not reasonable. For example, a called party should not be able to revoke consent by leaving a message at an office of the caller. The Commission should recognize that oral revocations are a common area of abuse, and have been the fodder for abusive litigation. Plaintiffs commonly claim that they orally revoked consent, a claim that is hard to prove or disprove (even with extensive discovery). Further, allowing an oral revocation places an unreasonable burden on the caller’s customer service agent to determine the extent of specific request (e.g. is the request to stop calling limited to the caller’s current call, to the current issue, or is it permanent regardless of the issue?).

NCHER also recommends that the FCC provide guidance on what are acceptable procedures for a calling party to notify customers about the means they can follow to revoke consent. We recommend that the Commission specify that it is reasonable for a calling party to provide a clear disclosure containing its revocation procedures on its website, coupled with at least one outbound disclosure annually that could be on a billing or other statement provided to the customer. The Commission should also make clear that the disclosure can be included in any written form where the borrower provides consent, including (as suggested by the Court of Appeals) as part of the contract between the caller and the consumer.

D. Protection for Federal Servicers and Collectors of Federally-Owned and -Guaranteed Debt

The Commission seeks renewed comment on a petition for reconsideration filed regarding its 2016 Broadnet Declaratory Ruling¹⁷ (“Broadnet Ruling”). NCHER supports the Broadnet Ruling, which provides that federal government contractors acting at the direction of a federal agency are not “persons” under the TCPA. We believe the Commission has the authority to grant immunity from liability to such contractors.

The Commission also seeks renewed comment on the petition for reconsideration filed by Great Lakes Higher Education Corp., Navient Corp., Nelnet, Inc., Pennsylvania Higher Education Assistance Agency, and the Student Loan Servicing Alliance¹⁸ (the “Petition for Reconsideration”) regarding the 2016 Federal Debt Rules¹⁹. The rules

¹⁷ Declaratory Ruling, 31 FCC Rcd 7394 (2016).

¹⁸ Petition for Reconsideration, CG Docket No. 02-278 (filed December 16, 2016).

¹⁹ Report and Order, 31 FCC Rec 9074 (2016).

purport to implement the authority granted to the Commission by Section 301 of the Bipartisan Budget Act of 2015²⁰ (the “Budget Act Amendment”). The Budget Act Amendment exempts from the TCPA’s prior consent requirement those calls made to a telephone number assigned to a cellular telephone service “solely to collect a debt owed to or guaranteed by the United States.”²¹ The intent in passing the Budget Act Amendment was, in large part, driven by the benefits provided to borrowers of federal student loans, discussed in detail in Part II of this letter, and the federal government in facilitating calls to student loan borrowers. While the Budget Act Amendment granted to the Commission discretionary authority to prescribe regulations to restrict or limit the number and duration of such calls, NCHER believes that the three-call attempt-per-thirty-day limit in the 2016 Federal Debt Rules are arbitrary and so restrictive that it completely thwarts the intent of Congress. Further, by adopting the one-call attempt limit to reassigned numbers that was in the 2015 Order, the Budget Act Amendment was rendered completely meaningless. NCHER continues to strongly support the Petition for Reconsideration and encourages the Commission to grant the petition.²²

As noted, the Budget Act Amendment was intended to provide relief, for calls made to collect federally-held or -guaranteed debt, from otherwise applicable general TCPA calling restrictions. For this reason, the Budget Act Amendment should not be interpreted to limit or restrict any call which would be permitted under existing rules or any new, generally applicable TCPA rule issued in response to the Public Notice. With respect to calls that would be otherwise restricted, NCHER recommends that the 2016 Federal Debt Rules be reconsidered to allow more expansive contacts with student loan borrowers. As explained in the Petition for Reconsideration, and NCHER’s response thereto²³, the three-call-per-month limit is far too restrictive. If the Commission deems any limit necessary, it needs to be higher, as proposed in the Petition for Reconsideration. We also emphasize that the revised Federal Debt Rules should clearly cover those calls made to service federal student loans before default and calls made to collect on federal student loans after a default occurs, and that the revised rules should clearly apply to both federally-guaranteed loans (e.g. FFELP loans) as well as federally-owned loans (e.g. Federal Direct Loans). It should be noted that privately-held, but federally-guaranteed loans are not covered by the Broadnet Ruling because they are not serviced by a federal contractor. This alone is reason to grant the Petition for Reconsideration.

With respect to calls to reassigned numbers, NCHER notes that the Budget Act Amendment focuses on the purpose of the call (i.e., making the call to collect a debt) not the result (i.e., who in fact is reached). A federal student loan servicer or collector has no interest in communicating with individuals who have no connection to the debtor when the purpose of the call is to collect the debt on behalf of the federal government. The caller desires to avoid making a wrong-party call as much as the wrong-party called desires to avoid receiving it, but has no way to reliably determine whether a number has been reassigned. Covered calls should include calls to numbers that the caller reasonably believes belongs to the debtor. One specific area, not otherwise mentioned in the Public Notice, involves prerecorded messages to mobile phones. The Budget Act Amendment exempts calls using a prerecorded message from the TCPA, subject to any FCC regulation governing the frequency and duration of such calls. NCHER believes that the Commission should clarify that prerecorded messages relating to the servicing and collection of federally-owned or -guaranteed debt are covered by the exemption in the Budget Act Amendment.

Finally, the 2016 Federal Debt Rules go well beyond restricting or limiting the number and duration of calls. The reconsideration should be limited to these topics and should not address, for example, revocation of consent. A

²⁰ Pub. L. No. 114-74, §301.

²¹ Section 301 of Public Law 114-74 amending Section 227(b)(2) of the Communications Act.

²² See NCHER Comments on Reconsideration Petition, CG Docket No. 02-278 (filed February 1, 2017).

²³ *Id.*

borrower should not have the right to opt out of previously granted consent, as Congress has clearly spoken to this issue by adopting a specific exemption from the consent requirement for such calls.

IV. Conclusion

The FCC's implementation of the TCPA has fostered a flood of litigation, which has been costly for legitimate businesses and prevented them from communicating with their customers. While the TCPA was enacted to stop abusive telemarketing, its implementation by the Commission and some courts has ended up being a barrier that prevents businesses from making informational calls to their customers. In Part II of this letter, NCHER laid out in detail the reasons why, in the context of the servicing and collection of federal and private education loans, this barrier has been harmful to the consumer. NCHER appreciates the Commission's interest in taking a renewed look at some of the misguided provisions of the 2015 Order that have proven harmful to student loan borrowers. These borrowers want and need timely and accurate information to better manage their student loan debt and avoid delinquency and default, and to rehabilitate loans that have defaulted. We encourage the Commission to move forward with this important initiative, and stand ready to be of assistance in this effort.

Sincerely,

A handwritten signature in black ink, appearing to read "J P Bergeron", with a stylized flourish at the end.

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